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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-882

RICHARD M. NIXON, et al.,

Petitioners,

v.

HEDRICK SMITH, et al.,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Preliminary Statement

This is one of four petitions involving three separate cases now before this Court (*Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir.), *petition for cert. filed*, 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-880); *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir.), *petition for cert. filed*, 48 U.S. L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-881); *Smith* v. *Nixon*, 606 F.2d 1183 (D.C. Cir.), *petition for cert. filed*, 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-882)) involving substantially related issues of warrantless wiretaps and national security, the invasion of First Amendment rights, immunity for constitutional torts and the application of the good faith defense. Despite the government's assertions, all the cases are not properly ripe for review by this Court at this time.

For the reasons stated below, respondents believe that the first question presented by the government—on absolute Presidential immunity—was in large part settled by this Court less than two years ago in *Butz* v. *Economou*, 438 U.S. 478 (1978). Furthermore, the case presents a most extreme factual and legal issue—the acts of Mr. Nixon in question here formed the basis of Article II, paragraph 2 of the articles of impeachment recommended by the House Judiciary Committee. *See* H.R. Rep. No. 93-1305, 93d Cong. 2d Sess. 146-50 (1974). Thus the issue of absolute Presidential immunity presents itself in this case in such an unusual posture that it is extremely unlikely to repeat itself.

The second and third questions presented by the government are completely dependent on facts which were developed to some degree in one of the three cases now before this Court (*Halperin* v. *Kissinger, supra*) but which were never made part of the record in this case. Thus a remand for further proceedings is essential in this case before questions 2 and 3 can be properly addressed. For these related reasons, as explained below, certiorari should be denied.

A. *Presidential Immunity*

The only one of the three questions in the government's petitions that might present a "pure" question of law is the first, dealing with Presidential immunity.[1] As noted later in this memorandum, considerations of Presidential immunity might well be different when a sitting President is sued for a common law tort than when an ex-President

[1] The issue of the immunity of the President's "closest advisors, including the Attorney General"—as distinguished from the President himself—was already settled by this Court in *Butz* v. *Economou*, 438 U.S. 478 (1978).

is sued for constitutional torts which formed the basis of imminent impeachment proceedings against him. Since the Constitution allows impeached Presidents to be tried criminally for actions that led to impeachment,[2] a civil suit for damages should also be allowed for those same acts. And the rule should be the same for a President who was forced to resign because of imminent impeachment proceedings against him.

Once the issue is properly framed, the government's first question (insofar as it was not already settled by *Butz* v. *Economou*, 438 U.S. 478 (1978)) is properly viewed as a unique one in our constitutional history. Mr. Nixon is a "class of one," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 472 (1977), the only President forced to resign because of the threat of impeachment proceedings, the only President named as an unindicted co-conspirator by a federal grand jury (*see United States* v. *Nixon*, 418 U.S. 683, 687n.2 (1974)), the only ex-President explicitly granted a Presidential pardon for possible criminal acts taken while President of the United States. *See* 10 *Weekly Compilation of Presidential Documents* 1103 (1974).

Civil liability against an ex-President for engaging in the acts in question here is not likely to be a recurring problem. It would surely have to be a "rare" event, as the court noted below in the *Kissinger* case (Kissinger Petition at 45a). This Court has already examined the special legal problems of the Nixon presidency in three cases, *United States* v. *Nixon, supra, Nixon* v. *Administrator, supra*, and

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[2] Art. 1, Sec. 3, cl. 7: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or profit under the United States . . . *but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*" (emphasis added).

Nixon v. *Warner Communications, Inc.*, 435 U.S. 589 (1978). A fourth Nixon case is not necessary now.

B. *Lack of Factual Development*

The Court of Appeals below remanded all three cases for trial or further proceedings. In this action there has been no discovery whatsoever—indeed the defendants have not even submitted an answer.[3] In *Zweibon* v. *Mitchell, supra,* there had been some limited discovery but no trial. In *Halperin* v. *Kissinger, supra,* the district court had granted summary judgment for and against certain defendants but the Court of Appeals ordered a remand for hearings on a variety of issues: (1) whether the wiretap in question (part of the same program involved in this case) "was a valid national security action" (Kissinger Petition at 26a); (2) whether "the surveillance was initiated for political reasons" (*id.* at 27a) and thus was not within the scope of 18 U.S.C. §2511(3) (repealed 1978) dealing with presidential surveillance powers; (3) whether "Fourth Amendment reasonableness standards" were met in installing and maintaining the wiretaps (*id.* at 32a); (4) in addition, an appropriate hearing on damages would be necessary at which the plaintiffs could present evidence on "emotional distress and mental anguish" (*id.* at 34a); (5) the immunity of individual defendants would also have to be examined in further proceedings (*id.* at 44a); (6) there were also "genuine issues of material fact as to Kis-

[3] Rather than submit an answer the defendants moved to dismiss the complaint on statute of limitations grounds. The trial court did dismiss the action on three separate grounds: (1) the statute of limitations had run; (2) the action was barred as a matter of law because the defendants had a good faith defense, and (3) ex-President Nixon was absolutely immune. The Court of Appeals reversed the district court on all three issues (except as to the telephone company defendant) and ordered the case to proceed to trial.

singer's role in the installation and maintenance of the wiretap" which precluded the grant of summary judgment and required further hearings in the district court (*id.* at 49a-50a).

In short, even in the *Kissinger* case, the most fully developed of the three related actions, further evidentiary hearings were required by the Court of Appeals. These hearings might obviate or eliminate the factual basis of the questions presented in the related petitions for certiorari. At the very least they will allow the issues to be presented in a more fully developed form. *A fortiori,* these considerations apply to this case where there was no discovery and to the *Mitchell* case where discovery was limited.

Counter Statement of the Case

The government's petition misstates the background for the wiretap in question here and omits significant facts concerning the Smith wiretap.

First and foremost, respondent Hedrick Smith is a working journalist whose home telephone was wiretapped day and night for 89 days with the consequence that the government overheard every conversation he had on that phone with his sources, his colleagues and his editors—as well as his personal family conversations. It would be difficult to imagine a more sweeping or gross invasion of the First Amendment interests of the working press. As this Court said in *Branzburg* v. *Hayes,* 408 U.S. 665, 707-708 (1972), "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *See also Zurcher* v. *Stanford Daily,* 436

U.S. 547, 570 (1978) (Powell, J., concurring). Whatever the background or history of the thirty years of national security wiretaps before 1969 they had not been used to any degree for the purpose of wholesale and sweeping wiretapping of journalists.[4]

The government's petition recites that "between February and April, 1969" various leaks to the press occurred involving certain foreign policy documents and classified information. (Government's Petition at 4) These leaks allegedly revealed our foreign policy position on "several important and sensitive issues," including SALT, peace proposals in the Middle East, terminating our involvement in Viet Nam "and the return of the island of Okinawa to Japanese control." (*Id.* at 4-5) As a result of these leaks, high government officials claim to have concluded that foreign policy initiatives were being jeopardized and that the government had to take action to locate the sources and stop the flow of secrets to the press.

The court below held that the government's legal argument in justification of the wiretaps should be rejected out of hand—namely that the President has the "inherent power" to wiretap journalists without a warrant because of a suspicion that information—classified or otherwise—was leaked to the press and published to the world.[5] If a

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[4] The Church Committee (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) reported two prior cases of working journalists being wiretapped for publishing classified information. One journalist was wiretapped for seven days in 1961 and another for 33 days in 1962. *See* Senate Select Comm. to Study Governmental Operations, *Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans—Final Report, Book III,* S. Rep. No. 94-755, 94th Cong., 2d Sess. at 323 ("Warrantless FBI Electronic Surveillance") (1976).

[5] The Church Committee Final Report also condemned the type of wiretap program at issue here. It noted: "This wiretapping program did not reveal the source of any leaks of classified data,

violation of the espionage laws occurs, Title III gives the government ample authority to investigate the crime, in conformity with the requirements of the Fourth Amendment. *See United States* v. *United States District Court*, 407 U.S. 297 (1972).

More important, the facts revealed in the *Kissinger* case and the public record show that the asserted justification simply did not exist as far as the respondents were concerned. Put another way, the events that supposedly triggered the wiretap program had nothing to do with the actions of Hedrick Smith.

The Okinawa story (the only alleged "leak" involving respondents herein) occurred in June, 1969—not between February and April, 1969—and thus took place after the crucial meetings in April and May, 1969 when the key decisions were made to embark on the program (*see* Kissinger Petition at 5, 4a-6a). Thus Hedrick Smith was not involved in any of the leaks that gave rise to the program, contrary to the implication of the government's petition.[6]

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which was its ostensible purpose, but it did generate a wealth of information about the personal lives of the targets . . . . Vast amounts of political information were also obtained from these wiretaps." Senate Select Comm. to Study Governmental Operations, *Intelligence Activities and the Rights of Americans—Final Report, Book II*, 94th Cong., 2d Sess. 200 (1976) (footnote omitted).

[6] We also question the extent to which the government is applying the national security concept. If a story about our negotiations with our Japanese ally over return of an island about which many Americans had a great interest justifies a three month wiretap on a working journalist on national security grounds, then that term has lost its meaning. *See United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977). The range of reporting to which the government tries to apply its theory would make scores of journalists writing on foreign or diplomatic affairs proper targets if they reported anything more than official government handouts. That is not what the First Amendment means. *See Houchins* v. *KQED, Inc.*, 438 U.S. 1, 13-14 (1978) (Burger, C.J.).

Furthermore, he did not meet any of the criteria established by the principals—Nixon, Hoover, Mitchell, Kissinger—for determining who should be targeted for the wiretaps. The criteria were: (1) access to the leaked information; (2) unfavorable information in the individual's security file; (3) FBI investigations that listed the individual as a potential source of leaked information. (Government's Petition at 5-6) As the court below noted, "Smith did not satisfy the three criteria established by the Nixon administration for identifying surveillance subjects." He had no access to classified information and there was no internal security information on him. Nor did the wiretap itself reveal any classified material. Thus, as the court said below, "there seems to have been little reason to believe, under the Government's own guidelines, that Smith posed a continuing security risk." (Government's Petition at 8a)

Thus the public record facts indicate the contrary of what the government asserts—the wiretap program against the respondents here was not a legitimate national security matter, but it was, as the respondents asserted in their complaint, "initiated . . . and used by defendants . . . in bad faith for the purpose and effect of monitoring the sources of plaintiff Hedrick Smith's news stories which were personally embarrassing to high government officials but which did not constitute violations of national security laws or regulations." (Amended Complaint par. 34; Smith Joint App. 83a)

In summary, the government's effort to justify the wiretap program as a whole is without substance or legal support. Nor does it answer the question of whether any particular target of the program was properly chosen. When the victim is a journalist who should never have been targeted under any circumstances, who was not involved in the allegedly serious leaks that gave rise to the program,

who did not meet the criteria for being selected and whose conversations—and the conversations of his entire family —were seized in a wholesale sweep for three months, there is no possibility of justifying his selection. Regardless of the need for a warrant, the Fourth Amendment's other requirements—probable cause, particular description of the things to be seized, minimization, time limitation and so on—were clearly violated.

Reasons for Denying the Writ

A. *Presidential Immunity*

The chief question which the government seeks to present to the Court is the issue of Presidential immunity from tort liability for acts he took as President. On reflection, it is obvious that the question may be presented in a variety of situations:

(1) Suits against a sitting President for common law torts committed while exercising Presidential authority;

(2) Suits against an ex-President for common law torts committed while exercising Presidential authority;

(3) Suits against a sitting President for constitutional torts committed while exercising Presidential authority;

(4) Suits against an ex-President for constitutional torts committed while exercising Presidential authority; and

(5) Suits against an ex-President for constitutional torts committed while exercising Presidential authority which torts were the basis of impeachment proceedings or led to forced resignation because of imminent impeachment proceedings.

The government's petition presents the question as if it involved suits in category one above. (*See* Kissinger

Petition at 17, n.16.) It may well be that a sitting President should not be sued for a libel or slander he uttered in a Presidential address. Certainly we do not want a President to be diverted from an international crisis by a deposition or trial subpoena. And *Barr* v. *Matteo,* 360 U.S. 564 (1959) may still have some vitality.

But *Butz* v. *Economou,* 438 U.S. 478 (1978) made a careful distinction between common law torts and actions of a federal official which "ignored an express statutory or constitutional limitation on his authority." *Id.* at 489. The Court noted that prior cases had established that "there could be no immunity defense," for an "unconstitutional act." *Id.* at 490-91. This Court wrote that "*Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution." *Id.* at 495 (footnote omitted).

Furthermore, this principle was applied to every federal official up to cabinet rank. This Court rejected the idea that while a federal officer who breaks into a citizen's home without legal authority is liable, "an official of higher rank who actually orders . . . a burglary is immune simply because of his greater authority." *Id.* at 506. This Court quoted from the famous lines of *United States* v. *Lee,* 106 U.S. 196, 220 (1882), " 'No man in this country is so high that he is above the law.' " *Id.* at 506.

It would simply be an absurdity to allow a federal agent who committed a burglary to be sued, to allow his superiors —up to cabinet level—to be sued if they ordered the burglary, but to prohibit a suit against the President who may have deliberately and consciously and maliciously ordered the operation. There is simply no justification in reason or law for the buck to proceed to the cabinet but to stop before

it reaches the President, particularly on the facts at issue in this case.

Butz would therefore determine the issue of whether a President may be sued for committing a constitutional tort (categories 3, 4 and 5 above). The problems of suing a sitting President might still give a court pause, but that issue is not present in this case. In fact, as noted above, we have the most extreme situation imaginable—a suit for a constitutional tort against an ex-President whose acts led to imminent impeachment proceedings and a forced resignation. Since the impeachable acts could later form the basis of criminal proceedings (Art. I, Sec. 3, Cl. 7, quoted in fn. 2 above), a civil suit for damages should also be allowed.

But in our entire political history it is only the events of the late 1960's which have even raised the question. Citizens simply do not sue ex-Presidents for acts they took while President. To examine the question of Presidential immunity in such an unusual and aberrational context is simply inappropriate.

The immunity of the "closest advisors" of the President "including the Attorney General" was necessarily settled in *Butz* v. *Economou, supra.* It is impossible to distinguish between the Secretary of Agriculture who was not granted absolute immunity in *Butz* and the Attorney General, held liable below. To the extent that a cabinet level officer of any kind is exercising judicial-type or prosecutorial functions (as distinguished from the investigative, non-prosecutorial actions involved in the instant case) he will be protected, as this Court noted in *Butz.* But the government is simply trying to reargue *Butz* in this petition by calling the Attorney General and the other defendants (who include FBI officials as well) the "closest advisors" of the President. Every

cabinet member is a "close advisor" of the President, as are most of the higher level positions of each executive department. There is nothing in the *Butz* case that would distinguish between executive department officials as far as immunity is concerned depending on their proximity to the President.

B. *Good Faith Immunity as a Matter of Law*

The second question presented by the petition is whether the defendants have proved their good faith as a matter of law since their actions occurred before the decision of this Court in *United States* v. *United States District Court,* 407 U.S. 297 (1972) *("Keith").* Whether that question is properly presented in the other cases—which we dispute below —it cannot be determined *in this case* at the present stage of the proceedings. The government by trying to group all three of the pending cases together has overlooked the different procedural stages of the actions and has presented a question which has no relevance for the *Smith* respondents.

The government's argument presented in the Kissinger petition accepts the fact that the good faith defense presents both an objective and a subjective component, as outlined in both *Butz* and *Procunier* v. *Navarette,* 434 U.S. 555 (1978). The government argues that in *Halperin* v. *Kissinger, supra,* there was no finding of malice or subjective bad faith since the trial judge did not find the basis for an award of punitive damages. However, the trial judge noted explicitly "As for any contention of subjective good faith, the undisputed record in this case controverts such a defense." (Kissinger Petition at 73a) The government seems to suggest that only the same kind of finding of malice that justifies an award of punitive damages can lead to a finding of subjective bad faith. That is simply not the law. A court

might well conclude that an official acted in bad faith (*i.e.*, in clear and conscious disregard of an established right) which justified a compensatory damage award but he did not act with such malice as to justify an award of punitive damages. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975): "A *compensatory award* will be appropriate only if the school board member has acted with such an impermissible motivation . . . that his action cannot reasonably be characterized as being in good faith." (emphasis added). *See also Cruz* v. *Beto*, 603 F.2d 1178 (5th Cir. 1979); *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975) (knowing but nonmalicious failure to obey the law can lead to award of compensatory damages: no punitive damages awarded).

If the government's contention is correct, the converse would have to be true as well: whenever there is a finding of subjective bad faith, then punitive damages must be awarded automatically. The case law does not support that proposition, and it is a position that the government would surely dispute in another context.

More important, as far as the Smith respondents are concerned, that argument has absolutely no meaning in their case. There was no finding of an absence of subjective bad faith or a lack of malice. There was no determination of these issues at all, unlike the *Kissinger* case. There was no discovery, no factual submissions on this point, not even an answer by the defendants. Even if this Court grants certiorari in *Kissinger* and adopts the government position on this point, it would not affect the Smith respondents. There might well be evidence of malice in the papers held by the government which respondents have not seen. At this stage of the *Smith* case, that issue cannot be determined against the respondents.

As for the objective good faith defense, the government cannot succeed on that issue either. Its entire argument

rests on the notion that until this Court decided the *Keith* case, there was no settled constitutional law on national security wiretaps. Thus the defendants should have a qualified immunity for their actions.

Once again, even if that issue were determined in favor of the government, that would not dispose of the *Smith* case. The defendants must satisfy both components of the good faith test—subjective and objective. Since they cannot succeed on the subjective good faith test because of the lack of any findings on that issue in this case and because no discovery of any kind has been allowed, success on the objective good faith issue will avail them nothing in this case. It must proceed further no matter what happens in the *Kissinger* case petition.

More important, the government ignores the findings of the Court below that *Keith* did not establish any new law on the subject. It did not overrule past decisions nor point in any new direction. This Court's decision in *Katz* v. *United States,* 389 U.S. 347 (1967), which predated all of the events in question, established that the Fourth Amendment covered more than property rights, it extended to incorporeal words as well as things, and specifically applied to the seizure of words through a wiretap. A warrant was therefore required for such seizures.

Most significantly, the *Keith* case only dealt with the need for a warrant. It did not change any of the preexisting law on other requirements of the Fourth Amendment, including the need for probable cause, the need for specific descriptions of the things to be seized, the need for minimization and time limitations. All the "reasonableness" requirements of the Fourth Amendment were always part of the law. It is the Smith respondents' claim that regardless of the warrant requirement, other violations of the

Fourth Amendment occurred in their case: there was no probable cause for selecting them as a target, an effort was made to infringe upon their First Amendment protected journalist activities, the wiretap was on too long, no minimization occurred, dissemination of the wiretap materials went to political operatives and so on. Once again, even if this Court decided that *Keith* did establish new law—a point which we dispute—a trial would still be necessary on all the other "reasonableness" requirements of the Fourth Amendment.

C. *Retroactivity*

The final question presented by the government deals with the question of the retroactivity of the *Keith* case and the application of the criteria of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971). The simple answer to the government's claim is that the *Chevron Oil* criteria do not apply to a situation where the good faith defense *already* applies. The good faith defense takes into account the unfairness of applying new law to a government official who sincerely believed that his actions were legal at the time they occurred. The *Chevron Oil* criteria are not additional tests to be applied when the good faith factors—both subjective and objective—have already been invoked.

This Court has previously noted that different considerations apply in different types of cases when problems of retroactivity arise. For example, there are special rules applying to retroactive application of new rules of criminal procedure, *Linkletter* v. *Walker,* 381 U.S. 618 (1965). There are special rules dealing with the effect of new law on municipal or other governmental bonds, *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940). There are also special rules on statute of limitations problems where parties have relied upon established

rules in planning for the time to bring suit which was the precise problem involved in *Chevron Oil.*

But the ordinary rule in tort litigation is that new rules are retroactively applied, *see Cadillac Motor Car Co.* v. *Johnson,* 221 F. 801 (2d Cir. 1915) (retroactive application of new rule established in *MacPherson* v. *Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916); *see also Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941) and discussion of the Court below in *Zweibon* v. *Mitchell, supra.*) (Mitchell Petition at 10a-17a)

In cases involving constitutional torts, the special rule on retroactive application of new law is the objective good faith defense: a government official will not be held liable if he acted sincerely without an intent to cause injury and if the right alleged to have been violated was not "clearly established." *Butz,* 438 U.S. at 498. There was no indication in *Butz, Procunier* v. *Navarette, supra* or *Wood* v. *Strickland, supra* that in addition to the test established in those cases on the objective good faith defense, ex post facto or retroactivity problems would have to be examined anew through a different and overlapping set of criteria established in *Chevron Oil.* Those criteria relate to a totally different problem where issues of subjective intent do not apply in the same way. Thus there is no need to discuss the *Chevron Oil* criteria in this situation.

If the criteria are applied, however, we believe that they require retroactive application of the *Keith* decision, just as the court below held in the *Mitchell* case.

Once again, the government seeks review of the decision below by citing legal rules and arguments which have no application to the current case before the Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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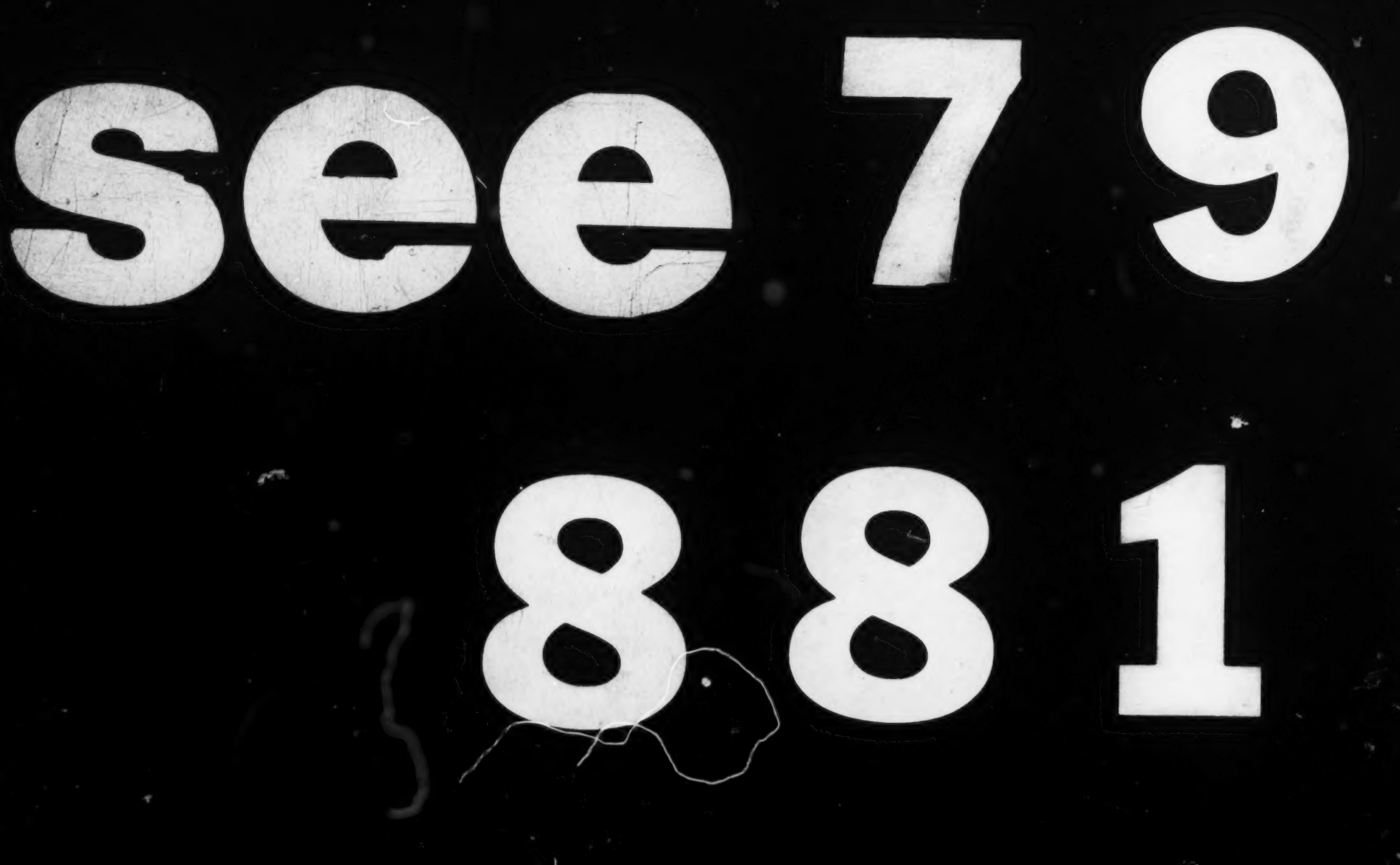
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see 7 9

8 8 3